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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of 1993 Annual Access Tariff Filings	)	CC Docket No. 93-193 Phase I, Part 2
GSF Order Compliance Filings	)	
In the Matter of 1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
In the Matter of 1995 Annual Access Tariff Filings	)	
In the Matter of 1996 Annual Access Tariff Filings	)	

MCI OPPOSITION TO APPLICATIONS FOR REVIEW

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SUMMARY

MCI Telecommunications Corporation (MCI) hereby submits its opposition to the Applications for Review filed by Pacific Bell and Bell Atlantic on July 25, 1997. Pacific Bell and Bell Atlantic seek Commission review of the Common Carrier Bureau's denial of Bell Atlantic's Petition for Clarification of the 1993-1996 Annual Access Order. The Commission should dismiss the applications for review because Pacific Bell and Bell Atlantic fail to demonstrates Bureau error, as required by Section 1.115(b)(2) of the Commission's rules.

The Bureau's Order concludes correctly that the refund methodology proposed by Bell Atlantic in its petition for clarification is contrary to the holdings of the 800 Data Base Reconsideration Order and Tennessee Gas, in that the proposed offsets constitute prohibited retroactive ratemaking. The Commission should reject Bell Atlantic and Pacific Bell's argument that, without the offsetting rate increases in the traffic sensitive, trunking, and interexchange baskets, they would be required to share more than the amount required by the Commission's rules. A refund of overcharges resulting from a sharing rule violation does not change the total amount of sharing any more than does a refund resulting from any other rule violation. The required refund simply reflects the fact that Bell Atlantic and Pacific Bell's common line basket customers never received the benefit of the sharing to which they were entitled.

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	)	**Phase I, Part 2**
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	)	
In the Matter of	)	**CC Docket No. 94-65**
1994 Annual Access Tariff Filings	)	
	)	
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1995 Annual Access Tariff Filings	)	
	)	
In the Matter of	)	
1996 Annual Access Tariff Filings	)	

MCI OPPOSITION TO APPLICATIONS FOR REVIEW

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its opposition to the Applications for Review filed by Pacific Bell and Bell Atlantic on July 25, 1997, in the above-captioned docket. Pacific Bell and Bell Atlantic seek Commission review of the Memorandum Opinion and Order (Order) released by the Common Carrier Bureau (Bureau) on June 27, 1997.[1] Pacific Bell and Bell Atlantic contend that the Order requires them to share an amount in excess of that which is permitted by Commission

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[1]In the Matter of 1993 Annual Access Tariff Filings; GSF Order Compliance filings; 1994 Annual Access Tariff Filings; 1995 Annual Access Tariff filings; 1996 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, Phase 1, Part 2; CC Docket No. 94-65, released June 25, 1997.

rule, and is therefore in conflict with the Commission's rules and orders.[2] The Commission should deny the applications for review.

II. Background

In the 1993-1996 Annual Access Order,[3] the Commission concluded that Pacific Bell and Bell Atlantic had violated the Commission's price cap rules and orders by incorrectly allocating sharing amounts among the price cap baskets in their 1993, 1994, 1995, and 1996 annual access filings.[4] The Commission also concluded that these LECs had overcharged their customers if any API that was in effect exceeded the PCI that would have been in effect had it been computed pursuant to the Commission's rules and orders, or any service category SBI or subcategory SBI exceeded its corrected upper limit, or any CCL rate exceeded the corrected maximum CCL rate.[5] If the rates that were in effect exceeded the applicable corrected cap, the LEC was required to refund the above-cap service category or basket revenue with interest. The refund was to be

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[2]Pacific Bell Application for Review at 1 (Pacific Bell AFR); Bell Atlantic Application for Review at 2 (Bell Atlantic AFR).

[3]In the Matter of 1993 Annual Access Tariff Filings; GSF Order Compliance Filings; 1994 Annual Access Tariff Filings; 1995 Annual Access Tariff Filings; 1996 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 94-65, released April 17, 1997 (1993-1996 Annual Access Order).

[4]1993-1996 Annual Access Order at ¶39.

[5]Id. at ¶¶104-105.

implemented through a temporary exogenous cost decrease effective July 1, 1997, and reversed on July 1, 1998.

Application of the refund methodology prescribed by the 1993-1996 Annual Access Order shows that Pacific Bell and Bell Atlantic overcharged their customers for common line basket services during the period under consideration, and are required to refund the above-cap amount to their customers through a reduced 1997-98 common line PCI. Application of the Commission's methodology also shows that no "offsetting" adjustment to the 1997-98 traffic sensitive, trunking, and interexchange PCIs is required. Because Pacific Bell and Bell Atlantic overallocated sharing to these baskets, their PCIs for these baskets were lower than would have been the case had the PCIs been computed pursuant to the Commission's rules and orders. Thus, rates below the original caps were also below the corrected caps. Consequently, no adjustments to the LECs' 1997-98 traffic sensitive, trunking, and interexchange PCIs are required in order to implement the remedial actions prescribed by the 1993-1996 Annual Access Order.

On May 8, 1997, Pacific Bell and Bell Atlantic filed their refund plans with the Bureau.[6] Contrary to the Commission's instructions in the 1993-1996 Annual Access Order, Pacific Bell and Bell Atlantic proposed not only the required exogenous cost

[6]Letter from Al Swan, Pacific Bell, to William F. Caton, FCC, May 8, 1977 (Pacific Bell Refund Plan); Letter from Maureen Keenan, Bell Atlantic, to William F. Caton, FCC, May 8, 1997 (Bell Atlantic Refund Plan).

decrease in the common line basket, but also exogenous cost increases in the traffic sensitive, trunking, and interexchange baskets.[7]

Then, on May 18, 1997, Bell Atlantic filed a Petition for Clarification, requesting that the Commission clarify that the methodology employed by Pacific Bell and Bell Atlantic in their refund plans was consistent with the intent of the 1993-96 Annual Access Order.[8] In particular, Bell Atlantic argued that reducing the common line PCI without increasing the other PCIs would not fully "correct" the LECs' misallocation of sharing.[9]

In the Order, the Common Carrier Bureau denied Bell Atlantic's petition for clarification. The Bureau relied on the 800 Data Base Reconsideration Order[10] and Tennessee Gas[11] for the principle that carriers are not permitted to offset refunds in one basket with retroactive rate increases in other baskets.[12] Pacific Bell and Bell Atlantic now seek Commission review of the Order, arguing that the Bureau erred in denying Bell Atlantic's petition for clarification.

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[7]See, e.g., Pacific Bell Refund Plan, TRP Chart EXG-1, column 5.

[8]Bell Atlantic Petition for Clarification, CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 94-65, filed May 19, 1997, at 7 (Bell Atlantic Petition).

[9]Bell Atlantic Petition at 1-2.

[10]In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, released April 14, 1997 (800 Data Base Reconsideration Order).

[11]Federal Power Commission v. Tennesee Gas Transmission Co., 371 U.S. 145, 152 (Tennesee Gas).

[12]Order at ¶15.

III. The 1993-1996 Annual Access Order's Methodology Is Consistent With the Price Cap Rules

Pacific Bell and Bell Atlantic's argue that the methodology outlined in the 1993-1996 Annual Access Order, without the modification sought by Bell Atlantic, does not "comport with the price cap rules."[13] To the contrary, the methodology prescribed by the 1993-1996 Annual Access Order is a straightforward application of the principles of price cap regulation to a refund calculation. Under price cap regulation, the PCIs, SBI upper limits, and CCL rate cap operate to define the "zone of reasonableness" for LEC rates.[14] It is therefore consistent with the price cap rules that, if the Commission finds in a tariff investigation that the rates in effect were outside this zone, the carrier may be required to refund the above-cap amount. It is also consistent with the price cap rules that, if the rates in effect were within the zone of reasonableness, no remedial action is required.

In this case, correcting Pacific Bell and Bell Atlantic's past PCIs for the misallocation of sharing shows that their common line basket API was above the true common line PCI for much of the period under consideration. Because Pacific Bell and Bell Atlanic's customers paid more for common line services than the maximum permitted by the price cap rules, the 1993-1996 Annual Access Order's methodology correctly requires a refund of these overcharges. On the other hand, correction of the

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[13]See, e.g., Pacific Bell AFR at 4.

[14]See, e.g.. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3299.

traffic-sensitive, trunking, and interexchange PCIs shows that rates in these baskets were generally below the correctly-computed cap. Because these rates were within the zone permitted by the price cap rules, the methodology in the 1993-1996 Annual Access Order correctly requires no adjustment to 1997-98 PCIs or other remedial action.

Despite the fact that the Commission's methodology is a straightforward application of the principles of price cap regulation, Bell Atlantic nonetheless argued in its petition for clarification that offsetting positive exogenous cost increases were required in the traffic sensitive, trunking, and interexchange baskets. The Bureau, in denying the petition for clarification, relied on the Commission's recent decision in the 800 Data Base Reconsideration Order.[15] In the 800 Data Base Reconsideration Order, the Commission concluded that a carrier could not offset a refund obligation with retroactive rate increases in other baskets.[16] This conclusion was based on the Supreme Court's holding in Tennessee Gas that even where a rate is found to be too low, "the company cannot recoup its losses by making retroactive the higher rate subsequently allowed."[17] Retroactive rate increases violate the "filed rate doctrine," under which a common carrier may only charge the rates covered by its tariff on file and in effect at a particular time. There is, as the Bureau notes in the Order, a "longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases."[18]

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[15]Order at ¶15,

[16]800 Data Base Reconsideration Order at ¶17.

[17]Order at ¶15 (citing Tennessee Gas, 371 U.S. at 152-53).

[18]Id.

It cannot be disputed that the "clarification" sought by Bell Atlantic would violate the filed rate doctrine. Correction of Bell Atlantic and Pacific Bell's past PCIs shows that their decision to calculate their traffic sensitive, trunking, and interexchange PCIs in a manner that violated a Bureau Order caused them to forego recovering certain revenues in these baskets. In their refund plans, Bell Atlantic and Pacific Bell sought to increase their traffic sensitive, trunking, and interexchange PCIs for the 1997-98 tariff year by the difference between the original PCIs and the PCIs that would have been in effect had they been computed pursuant to the Commission's rules and orders. In other words, Bell Atlantic and Pacific Bell sought to do the very thing prohibited by Tennessee Gas: recoup foregone revenues by making retroactive the higher rate subsequently allowed. Because the methodology that Bell Atlantic and Pacific Bell proposed violated the prohibition on retroactive ratemaking, the Bureau was correct to rely on Tennessee Gas and the 800 Data Base Reconsideration Order in denying Bell Atlantic's petition for clarification.

Pacific Bell contends that "the analysis in Tennessee Gas is dependent on the unrelatedness of the rates sought to be increased."[19] It states that, in this case, the "offsetting exogenous increases in traffic sensitive and trunking baskets are integral to and very much related to the exogenous decrease in the common line basket."[20] However, nowhere in Tennessee Gas does the Supreme Court suggest that its holding

[19]Pacific Bell AFR at 6.

[20]Id.

depends on rates being "unrelated." To the contrary, the Court's conclusion that a carrier cannot recoup its losses through offsetting rate increases is based on the fundamental principle that "the company cannot recoup its losses by making retroactive the higher rate subsequently allowed."[21] Moreover, in Tennessee Gas, the rates at issue were in fact related: the Tennessee Gas Transmission Company faced the possibility that the reallocation of costs among the zones could result in a rate increase in some zones and a rate decrease in other zones.[22]

Bell Atlantic seeks to distinguish the situation here from the factors considered in the 800 Data Base Reconsideration Order, arguing that it did not voluntarily forego the opportunity to earn revenues because "the correction ordered by the Commission only now creates the additional headroom in some baskets."[23] This argument is without merit. It is irrelevant that Bell Atlantic priced below cap by misstating its PCI instead of setting its rates below the true PCI. By Bell Atlantic's reasoning, a LEC's misallocation of any type of exogenous cost change could never result in a refund. Such an outcome would clearly undermine the price cap regime's system of baskets.

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[21]Tennessee Gas, 371 U.S. at 152-153.

[22]Id. at 149.

[23]Bell Atlantic AFR at 11.

IV. Customers Were Not Put On Notice That Retroactive Increases Could Occur

The Bureau was also correct to reject Bell Atlantic's argument that the original designation order put customers on notice that they could be subject to retroactive rate increases. The Bureau noted that "nothing in our previous designation orders covering this issue places customers on notice that they could be subject to prospective rate increases on account of sharing misallocations."[24] In its application for review, Bell Atlantic raises this argument again, claiming that language in the Suspension Order referring to the recalculation of price cap indices is evidence that the Bureau contemplated retroactive rate increases.[25]

It is true that the Suspension Order contemplated that the rates filed by Pacific Bell and Bell Atlantic might have to be adjusted by reallocating sharing among the baskets. However, the Suspension Order's discussion of the reallocation of sharing refers only to the steps that would have to be taken, upon conclusion of the investigation, to ensure that the LECs' going-forward rates were lawful. Had the investigation been concluded in the middle of a tariff year, Pacific Bell and Bell Atlantic would have had to redistribute their sharing obligation among the baskets for the remainder of the tariff year, until the sharing amount was reversed at the next annual filing.

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[24]Order at ¶18.

[25]Bell Atlantic AFR at 12 (citing In the Matter of 1993 Annual Access Tariff Filings, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd 4960, 4966 (Suspension Order)).

The language that Bell Atlantic cites in no way demonstrates that the Bureau contemplated retroactive rate increases. To the contrary, both the Bureau and petitioners contemplated that issues related to rates in effect prior to the conclusion of the investigation would, as usual, be addressed through the refund mechanism. In particular, the Bureau instituted an accounting order to put Bell Atlantic and Pacific Bell on notice that refunds might be required upon conclusion of the investigation.[26] There is no suggestion anywhere in the Suspension Order that the traffic sensitive, trunking, and interexchange rates were interim and could be increased retroactively upon conclusion of the investigation. When the Commission has provided for retroactive rate increases, it has done so explicitly by indicating that rates are interim and subject to trueup.[27] Finally, as the Bureau notes, nothing in the 1993-1996 Annual Access Order supports a conclusion that the Commission contemplated rate increases as a result of its decision.[28]

V. The Commission's Refund Methodology Does Not Increase Sharing

Pacific Bell and Bell Atlantic's core argument is that the Order is in conflict with prior Commission rules and orders because it requires them "to share an amount in

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[26]Suspension Order, 8 FCC Rcd at 4974 ¶113.

[27]See, e.g., In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, First Report and Order, 8 FCC Rcd 8344, 8360; In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, August 8, 1996, at ¶1067.

[28]Order at ¶14.

excess of that which is permitted by Commission rule."[29] Pacific Bell, for example, argues that "[i]f LECs were required to include only the negative adjustment to the Common Line basket and ignore the corresponding upward adjustments to other baskets, the effect would be not to correct the sharing misallocation, but to distort it even further."[30] Pacific Bell then goes on to state that "[o]ur calculations show that if AT&T and MCI prevail on this issue, Pacific Bell would be forced to share over 64% of its earnings during the affected time periods; nearly 30% more than what the rules require."[31]

Contrary to Pacific Bell and Bell Atlantic's contention, a refund obligation does not increase the amount of sharing. Refunds are ordered by the Commission when a rate has been found to be unlawful pursuant to Section 204(a), and reflect actual overcharges paid by customers. Requiring a refund of overcharges resulting from a sharing rule violation does not change the total amount of sharing any more than does a refund of overcharges resulting from any other rule violation.

Consistent with this, the sharing amounts used in computing the July 1, 1993, and subsequent corrected PCIs under the Commisison's refund methodology are exactly the same as those that Pacific Bell and Bell Atlantic used in their annual access filings. All that changes when calculating the corrected PCIs is the distribution of sharing

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[29]See, e.g., Pacific Bell AFR at 1.

[30]Id. at 6.

[31]Id. at 7.

amounts among the baskets. These corrected PCIs show that Pacific Bell and Bell Atlantic overcharged their common line basket customers and are thus required to refund the above-cap amounts. This refund does not increase the amount of sharing; it simply reflects the fact that the LECs' common line basket customers never got the benefit of the sharing amount to which they were entitled under the price cap rules.

Pacific Bell contends that the Bureau erred in relying on Tennessee Gas because "Tennessee Gas has no applicability to a case involving a section 205 prescription of rates."[32] It states that because sharing is authorized by section 205, the Commission cannot require the refund resulting from application of the 1993-1996 Annual Access Order "without going through the process and making the findings required by section 205."[33] This argument is without merit because, as was shown above, the refund methodology does not change the sharing amount.

VI. The Refund is Consistent With The Goals of Price Cap Regulation

In the Order, the Bureau found that the equities or "balancing of interests" in this case did not support the proposed offsets. In their applications for review, Pacific Bell and Bell Atlantic dispute this conclusion, suggesting that customers would not be harmed by offsetting increases. Pacific Bell, for example, contends that "allowing Bell Atlantic and Pacific Bell to include the corresponding upward exogenous adjustments to

[32]Id. at 6.

[33]Id.

the switching and trunking baskets will not overly advantage or disadvantage any particular customers."[34]

As an initial matter, even a different conclusion regarding the "balancing of interests" would not have allowed the Bureau to permit the offsets that Bell Atlantic and Pacific Bell seek. Regardless of the equities, the Supreme Court's holding in Tennessee Gas prevents the Bureau from authorizing retroactive rate increases of the type that Bell Atlantic and Pacific Bell propose.

Further, the Commission has already concluded in the 1993-1996 Annual Access Order that the LECs are required to refund overcharges.[35] The equities in this case support refunds. By misallocating sharing, Pacific Bell and Bell Atlantic charged their customers excessive rates for common line basket services for much of a four-year period. Pacific Bell and Bell Atlantic should be required to refund these amounts. Contrary to Pacific Bell and Bell Atlantic's contention, "undercharges" in other baskets did not compensate for overcharges in the common line basket. First, purchasers of common line basket services did not benefit from "undercharges" for special access, interexchange, or, in the case of purchasers of CAP transport, transport rates. Second, different access customers purchase in different proportions from the baskets. Thus, without a refund of common line basket overcharges, access customers, particularly those with a disproportionate share of common line basket revenues, would be harmed.

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[34]Id.

[35]1993-1996 Annual Access Order at ¶¶104-105 ("The LECs . . . must refund to their customers all amounts, plus interest, collected as a result of overcharges.").

The Bureau was correct to find that a "balancing of interests" favors the customer and that, as the Supreme Court found in Tennessee Gas, the "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions. . . ."[36]

The refund ensures that the underlying policy objectives of the price cap regime's system of baskets are achieved. The Commission has stated that, by establishing a separate common line basket, it could "ensure that . . . universal service programs are unaffected by the implementation of price cap regulation."[37] Without a refund of common line basket overcharges, this objective would be undermined. In addition, Pacific Bell and Bell Atlantic's misallocation of sharing permitted them to engage in the type of cross-subsidy that the system of baskets is intended to prevent.[38] By misallocating sharing, these LECs could, for example, reduce their transport and special access rates in response to perceived competition while recouping lost transport and special access revenues through higher rates for common line basket services, for which there was no possibility of competition. Similarly, Bell Atlantic was able to reduce its interexchange rates and recoup lost revenues from higher common line services. In short, Bell Atlantic and Pacific Bell were able to cross-subsidize potentially competitive transport, special access, and interexchange services at the expense of

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[36]Order at ¶15 (citing Tennessee Gas, 371 U.S. at 152-153).

[37]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6812.

[38]Id. at 6810-6811.

common line basket customers. The Commission should not permit the LECs to defeat the objectives of the price cap regime's system of baskets and to misallocate exogenous cost changes among the baskets with impunity.

The Commission should also reject Bell Atlantic's suggestion that its refund amount should be reduced because of the duration of the investigation.[39] The Commission recently rejected this argument in the 800 Data Base Reconsideration Order,[40] and it is clear that Bell Atlantic and Pacific Bell were not harmed in any way by the duration of the investigation. While Bell Atlantic and Pacific Bell's customers had to pay above-cap rates for almost four years, Bell Atlantic and Pacific Bell only had to keep track of the amounts collected pursuant to the tariff provisions that were found unlawful.

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[39]Bell Atlantic AFR at 14.

[40]800 Data Base Reconsideration Order at ¶16.

VII. Conclusion

For the reasons stated herein, MCI recommends that the Commission deny the applications for review filed by Bell Atlantic and Pacific Bell and affirm the Order.

Respectfully submitted,
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September 8, 1997

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on September 8, 1997.

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CERTIFICATE OF SERVICE

I, Barbara Nowlin, do hereby certify that copies of the foregoing Opposition to Applications for Review were sent via first class mail, postage paid, to the following on this 8th day of September, 1997.

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